Supreme Court, U.S.
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No. 90-1384

In The

# Supreme Court of the United States

October Term, 1991

CHARLES BOBST,

*Petitioner,*

vs.

NORFOLK SOUTHERN CORPORATION and HIGH RIDGE MOTEL COMPANY d/b/a HOWARD JOHNSON'S MOTOR LODGE EAST,

*Respondent.*

**Petition For Writ Of Certiorari To The Court Of Appeals Of Ohio**

## BRIEF OF RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether the Ohio Appellate Court properly affirmed the trial court's granting of summary judgment for Defendant, Norfolk Southern, on the basis that Defendant breached no duty of care owed to Plaintiff, Charles Bobst, under the Federal Employers' Liability Act, 45 U.S.C., § 51-60.

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## BRIEF OF RESPONDENT IN OPPOSITION

## OPINION BELOW

The Supreme Court of Ohio denied review of the decision of the Ohio First District Court of Appeals *Bobst v. Norfolk Southern Corporation*, 564 N.E.2d 500 (1990). The decision of the Ohio Court of Appeals (Petitioner App. A-5) and the decision of the Ohio Court of Common Pleas were not reported (Petitioner App. A-1).

## JURISDICTIONAL STATEMENT

Petitioner claims jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a) as a result of the petitioner's motion to certify being overruled by the Supreme Court of Ohio on November 28, 1990 (Petitioner App. A-11).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner asserts a claim for relief under the Federal Employers' Liability Act, 45 U.S.C. § 51-60.

## STATEMENT OF THE CASE

At the outset, it must be noted that High Ridge Motel Company, dba Howard Johnson Motor Lodge, East, ("High Ridge") is no longer a party to this action. Petitioner did not appeal the trial court's decision as to High Ridge.

Additionally, it must also be noted that the record in this case consists solely of the pleadings filed by the various parties. The only pleading containing any facts is the deposition of Mr. Charles Bobst, the petitioner, which was filed by respondent in support of its motion for summary judgment submitted at the trial court level. Consequently, the facts initially presented for review in this case were not complex. However, there exists some variance between the parties' interpretation and/or rendition of the facts. As noted in petitioner's brief, Mr. Bobst was engaged in a layover at High Ridge's motel

when he slipped and fell on ice allegedly injuring himself. When Mr. Bobst arrived at the motel on the morning in question, he saw that the motel premises was icy, slippery and snowy. He could see ice and snow on the ground. In fact, there was ice and snow everywhere.

As he exited the motel on his way to the adjacent McDonald's, nothing obstructed his view. Contrary to the petitioner's assertion, Mr. Bobst did not exit the "main" entrance to the motel. Rather, as the photographs appended to his deposition clearly reveal, he has exiting a side entrance to the motel premises. As he exited the motel door, he could see the ice and snow. There was nothing hiding or obstructing his view of the ice. No shoveling or snow removal had been attempted. What existed was simply the natural accumulation of ice and snow. It was daylight and there were no other unusual circumstances existing at the time of his fall.

Petitioner maintains that prior to this incident, complaints had been made to the motel management regarding snow, ice and slippery conditions at the motel. However, Mr. Bobst's deposition testimony clearly reveals that he had no personal knowledge of anyone complaining to the motel about snow, ice and slippery conditions. Finally, petitioner alleges that the Ohio Court of Appeals held that Mr. Bobst was acting within the course and scope of his employment when he was injured. However, the Ohio Court of Appeals did not actually make such a finding. Rather, for purposes of argument only both at the trial court level and the appellate level, respondent conceded that issue.

## ARGUMENT

This Court has never held that the F.E.L.A. imposed upon a railroad, as an employer, strict liability as a result of injuries sustained by railroad employees. Indeed, this Court has recognized that the F.E.L.A. does not make the railroad the insurer of its employees' health, welfare and safety. *Inman v. Baltimore and Ohio R.R. Co.*, 361 U.S. 138 (1959). The F.E.L.A. is not a workers compensation statute and does not impose liability without fault. *Pyzynski v. Penn Central Transportation Co.*, 438 F. Supp. 1044 (1977 W.D., N.Y.). The Act itself states that for an employee to recover against the railroad, the employee must establish "negligence" on behalf of the railroad, 45 U.S.C. § 51.

It is clear and undisputed that the 1939 amendment to the F.E.L.A. did eliminate "assumption of the risk" as a defense available to the employer. However, the amendment did not transform the F.E.L.A. into a workers compensation statute. This distinction is clearly defined by Justice Frankfurter in his concurring opinion in *Tiller v. Atlantic Coast Line R.R. Co.*, 318 U.S. 54 (1943). At 71 Justice Frankfurter wrote:

> [T]he 1939 amendment left intact the foundation of the carrier's liability – negligence. Unlike the English enactment which, nearly fifty years ago, recognized that the common law concept of liability for negligence is archaic and unjust as a means of compensation for injuries sustained by employees under modern industrial conditions, the federal legislation has retained negligence as the basis of a carrier's liability. For reasons that are its concern and not ours, Congress chose not to follow the example of most states in establishing systems of workmen's compensation not based upon negligence. Congress has to some

> extent alleviated the doctrines of the law of negligence as applied to railroad employees. By specific provisions in the Federal Employers' Liability Act, it has swept away 'assumption of risk' as a defense once negligence is established. But it has left undisturbed the other meaning of 'assumption of risk,' namely, that an employee injured as a consequence of being exposed to a risk which the employer in the exercise of due care could not avoid is not entitled to recover, since the employer was not negligent.

At 72, Justice Frankfurter continues:

> The basis of an action under the Act remains the carrier's negligence. The carrier is not to be relieved from the consequences of its negligence by any claim that the employee 'assumed the risk' of its negligence. But neither is the carrier to be charged with those injuries which result from the 'usual risks' incident to employment on railroads – risks which cannot be eliminated through the carrier's exercise of reasonable care.

Finally, also at 72, Justice Frankfurter writes:

> But until Congress chooses to abandon the concept of negligence, upon which the Act now rests, in favor of a system of workmen's compensation not dependent upon negligence, the courts cannot discard the principle expressed, in one of its senses by the phrase 'assumption of risk,' namely, that a carrier is not liable unless it was negligent.

This Court in *Missouri Pacific R.R. Co. v. Aeby*, 275 U.S. 426 (1928), did discuss the concept of assumption of risk as a defense to an employee's claim against his employer. However, it is clear that the decision was also based on an absence of negligence on the part of the railroad as a matter of law. The Court at 431 wrote: "as

negligence on the part of the petitioner is essential, we need not consider its contentions in respect of assumption of risk and negligence on the part of respondent."

It is axiomatic that in order to establish negligence, a party seeking recovery must prove that the party from whom recovery is sought breached a duty owed to the party seeking recovery and that said breach proximately caused that party damage.

Paragraph 3 of the syllabus in *Tiller* defines the duty owed by the railroad. It reads as follows:

> The question of the negligence of the employer is to be determined by the general rule which defines negligence as the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances; or doing what such a person under the circumstances would not have done. The standard of care must be commensurate to the dangers of the employment.

It is absurd under the facts of this case to hold that the railroad had a duty to clear a clean path from the motel premises door and across the motel's parking lot in order that the plaintiff could safely negotiate the natural accumulation of ice and snow to reach the McDonald's Restaurant. Arguably, if such a duty is found to be owed, the railroad would be required to clean a path all the way from the motel door to the entrance of the McDonald's Restaurant. This is an absurd burden or duty to impose upon the railroad. Absent a duty, no negligence can be found as duty is an indispensable element of negligence.

Petitioner cites several cases in support of his position that the railroad indeed has such a duty. In particular, petitioner cites *Kimbler v. Pittsburgh & L.E.R.*, 331 F.2d 383 (3rd Cir. 1964). Clearly, the facts in *Kimbler* are distinguishable from the facts found in this particular incident. *Kimbler* was injured on the premises of the railroad when he slipped on ice and snow. The court in *Kimbler*, however, recognized that the railroad is not an insurer of the safety of its employees. See, Paragraph 1 of the syllabus. Further, the court in *Kimbler* recognized that the railroad had no control over the vagaries of the weather or climatic conditions. At 387 of the *Kimbler* decision, the court recognizes the railroad's argument:

> Finally, the railroad argues that to impose liability under the facts here present would require it to call in innumerable men on a moments notice for the purpose of doing the impossible task of treating with chemicals 'all exposed steps, walkways, yard services, switches, engines, railroad cars and other walking services . . . irrespective of the location and number of such services.'

The court in *Kimbler* found that the railroad's argument was compelling when applied to the total yard and work area. Certainly, it would be an unduly burdensome and onerous duty to impose upon the railroad the duty to remove the natural accumulation of ice and snow at motels where arrangements for layovers have been made for its employees by the railroad. To impose such a duty would go beyond requiring the due care as defined in Paragraph 1 of the syllabus of *Tiller* and rather make the railroad strictly liable for any injuries that occurred to an employee at any time under any conditions.

Petitioner also places reliance on the decision of *Anderson v. Elgin, Joliet & Eastern Railway Company*, 227 F.2d 91 (8th Cir. 1955). Paragraph 1 of the syllabus of the *Anderson* decision reads as follows:

> Generally, a railroad is not liable under the F.E.L.A. to its employees for injuries resulting from climatic conditions, such as ice and snow; but *within its yard limits* it must exercise a degree of care commensurate with the risk to prevent the accumulation of ice and snow in such quantity, form, and location as to be a menace to the safety of its employees working in its yards. (Emphasis added).

The court in *Anderson* states the general rule and lists the exceptions, notably those that involve ice and snow within the railroad's yards. The exception to the general rule cited in *Anderson* is not found in this case. At the time of his fall, Mr. Bobst was not presented with any unusual circumstances. He was simply walking to the McDonald's Restaurant adjacent to the motel in broad daylight and with an unobstructed view when he slipped and fell on naturally accumulated ice and snow.

The petitioner himself recognizes that railroad companies have no control over the vagaries of the weather or climatic conditions when he cites *Raudenbush v. Baltimore & Ohio Railroad Co.*, 160 F.2d 363 (CA3 1947). The petitioner then cites a number of cases which he claims holds the railroad liable for the employee's injury sustained on natural accumulations of ice and snow. However, the cases relied upon by the petitioner are all distinguishable for a number of reasons. For example, petitioner's reliance on *Grothusen v. Natural Railroad Passenger Corporation*, 603 F. Supp 486 (E.D. Penn. 1984) is

misplaced. Grothusen apparently slipped on ice and snow while disembarking from an engine. The case was tried to a jury and a defense verdict was rendered. The employee appealed stating that the court should have granted him an instruction that "the defendant was negligent in this case and . . . such negligence contributed in whole or in part to the plaintiff's injury." *Grothusen, supra* at 489. The court found that no error in failing to grant that instruction existed as the jury determined that the railroad was not negligent.

The petitioner also relies on *DeChicc v. Metro-North Commuter Railroad*, 738 F.2d 856 (2nd Cir. 1985). Petitioner cites *DeChico* for the principle that the central question in dealing with cases involving the natural accumulation of ice and snow is whether the railroad had taken reasonable precautions to be sure that natural accumulations of ice, snow and water did not create hazards. Actually, a reading of *DeChico* shows that it stands for a much narrower principle. Specifically, the court in *DeChico* held that the question to be resolved was whether the railroad had taken reasonable steps to ensure that natural accumulations of ice, snow and water had not created hazardous conditions *inside* the shop where DeChico was working. The facts in *DeChico* are distinctly different from those found in this case.

In *Carter v. Union Railroad Co., et al.*, 438 F.2d 208 (3rd Cir. 1970), an employee of the railroad fell in mud from rain on a path to work over a third party's property. The path was used on a regular basis by employees of the railroad to get to work. The facts in *Carter* are also distinctly different than the facts found in this case.

## CONCLUSION

This case should not be reviewed by this Court as the appropriate result was reached by the courts below. This case turns on its own facts which are very narrow in scope. This case does not present a compelling or important question of grave public concern for this Court to review.

The F.E.L.A. is a statute requiring negligence on the part of the railroad before recovery can be had by an employee. The mere fact that an employee was injured does not establish a prima facie claim against the railroad. The employee must provide some evidence of negligence before a case can be submitted to a jury.

To hold, under the facts of this case, that the railroad had a duty to remove the natural accumulation of ice and snow existing in the parking lot at a motel where employees laid over would indeed judicially transform the F.E.L.A. into a workers' compensation statute. That task should be left to Congress.

The petitioner did not present any evidence that the railroad was aware (or should have been aware) of the icy conditions on the motel premises. There was no evidence presented detailing what the railroad should have done to prevent the fall. The facts are simply that Mr. Bobst fell on naturally accumulated ice and snow while leaving the motel to eat at the adjacent McDonald's Restaurant. There were no obstructions and it was daylight.

The facts in this case present one of those rare circumstances under the F.E.L.A. where fair minded jurors cannot honestly differ as to whether the fault of the

railroad played any part in Mr. Bobst's injury. Petitioner's writ of certiorari should be denied.

Respectfully submitted,

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